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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL NELSON BRESNAK, Defendant and Appellant.	2d Crim. No. B288095 (Super. Ct. No. 2013026187) (Ventura County)

Michael Nelson Bresnak appeals from the judgment after a jury convicted him of second degree murder (Pen. Code,[1] §§ 187, subd. (a), 189, subd. (b)). Bresnak admitted that he served three prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to 15 years to life in state prison plus three years. It ordered him to pay a $10,000 restitution fine (§ 1202.4, subd. (b)), and imposed and stayed a $10,000 parole revocation fine pending successful completion of parole (§ 1202.45, subd. (a)).

[1] All unlabeled statutory references are to the Penal Code.

Bresnak contends the judgment should be reversed because: (1) the trial court erroneously admitted evidence of jailhouse phone conversations he had with his mother, (2) the court failed to instruct the jury sua sponte on his mistake-of-fact defense, (3) the court should not have instructed the jury on the doctrine of mutual combat, (4) the jury's consideration of his voluntary intoxication was overly limited, and (5) the prosecutor committed misconduct during closing argument. He also contends the alleged errors, considered cumulatively, violated his right to due process. In a supplemental letter brief, Bresnak contends we should vacate the restitution fine[2] and remand the matter for the trial court to conduct an ability-to-pay hearing. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Background

For more than a decade, Bresnak's mother, Mary Francesca Hannan, had an on-and-off relationship with Jeffrey Korber. Hannan and Korber worked together at Hannan's law practice, and lived together in Ventura. Bresnak and his girlfriend, Desiree Carrillo, lived with them.

Bresnak and Carrillo moved into their own apartment in March 2011. On March 21, Bresnak left the apartment after speaking with Hannan on the phone. When he returned a few hours later, he told Carrillo that he had killed someone. He told Carrillo not to tell anyone or he would make her life "a living hell."

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[2] Bresnak also challenges the trial court's imposition of a $10,000 parole revocation fine. But because the court stayed this fine, his challenge is not yet ripe for adjudication. (*People v. Wittig* (1984) 158 Cal.App.3d 124, 137.) We do not consider it.

Bresnak called Gabriela Cunningham and told her that something happened at Hannan's house. Someone was dead. He asked Cunningham to help him dispose of the body. She refused and urged him to go to the police.

The next day, Hannan e-mailed Korber: "Why did you leave? I'm sorry about what happened. Please, come back. You know I love you. Why did you do this?" Hannan e-mailed Korber again on March 25: "It's not too late to change your mind. Love always, B." Two days later she e-mailed: "I guess you really intend to go through with it. I honestly thought you would turn around. Perhaps in the next life. B." She then e-mailed her brother that Korber had "announced that [he was] going back to Florida to work" and had left on March 24.

Both Hannan and Bresnak rented storage units at Extra Space Storage in Ventura later that week. Police arrested Bresnak on unrelated charges on April 3. Carrillo moved out of the apartment she shared with Bresnak as a result. She moved their property into Bresnak's unit at Extra Space Storage.

On April 29, Korber's car was parked at Los Angeles International Airport (LAX). It was ticketed in May, towed in August, and sold at auction.

Korber's brother called Hannan in May. Hannan told him that Korber left at the end of March because she cut his pay. She did not know where he was.

Korber's other brother filed a missing person report with a Laguna Beach detective in July, after he had not heard from Korber in over three months. In December, the detective interviewed Hannan. Hannan said she and Korber "had a situation" on March 21 when he picked her up drunk at the airport. They had a discussion later that evening and decided to

separate. Hannan said Korber left on March 28 or 29 and went to Florida. She had not seen or heard from him since.

In February 2012, Hannan rented a storage unit at Ventura Mini Warehouse. Bresnak had access to the unit after he was released from jail in July. Hannan kept her unit at Extra Space Storage, located about a half block away.

In June 2013, Cunningham called a California Highway Patrol officer and told him that Bresnak had called her in the middle of the night two and a half years earlier, told her that he had killed someone, and said he needed help disposing of the body. Cunningham said she told him to take care of the matter on his own. She did not help dispose of the body.

The officer met with Cunningham a few days later. Cunningham told him that Bresnak would ask her to help him get rid of the body whenever he was out of jail. She agreed to try to get Bresnak to take her to his storage unit.

Cunningham met with Bresnak on June 26. Highway Patrol officers followed as they drove. "If you're going to show it to me," Cunningham told Bresnak, "let's just get it over with." When they arrived at the Ventura Mini Warehouse storage unit, Bresnak pointed at the freezer and said the body was inside. He said that he had choked his victim, whom Cunningham believed to be Korber. The pair left the storage unit after 10 or 20 minutes.

The next day, Highway Patrol officers informed Ventura police that there was a body in a freezer inside Bresnak's storage unit at Ventura Mini Warehouse. Cunningham told a police sergeant that Bresnak told her to visit him and see the freezer. He said the victim had been "laying hands" on his mother before he choked him.

Police arrested Bresnak later that day. He had keys to the freezer's padlock on his person. Officers searched the storage unit that night. A blanket covered the locked freezer. It was connected to an electrical outlet in the light bulb. Korber's frozen body was inside.

Police searched Hannan's home that night. A car registered to Korber was in the garage. Inside the car was a receipt from a gas station near LAX dated March 21, 2011. Also inside were receipts for trailers Hannan and Bresnak each rented later that week.

Police interviewed Hannan. She denied there was violence in her relationship with Korber. No violent crime occurred in her house. She said Bresnak did not want Korber living with her and that the two men argued about that. Bresnak told her to "[g]et rid of the bastard."

Hannan said she told Korber to leave after the two got into an argument one night. Korber left the next morning. She said she did not know that he had been murdered. She was "positive" Bresnak did not have anything to do with Korber's death.

Hannan denied that she had rented any storage units. She believed the signature on a rental receipt police showed her was forged. She said she did not know Bresnak had purchased a freezer and did not know what was in it. At the end of her interview, she asked who told police there was a body in the storage unit.

Police interviewed Bresnak on July 2. In jail again, he was unaware that police had found Korber's body. When they mentioned the storage unit, Bresnak asked how they found out about it.

Bresnak admitted that he killed Korber. He said Korber kept "putting hands on" his mother. He and Korber got into a fight while they were both drunk. When Korber "started getting the better of [him]," Bresnak thought he was going to get killed. In response, he "just choked [Korber] out and fuckin' he stopped breathing." He later wrapped Korber's body in plastic and put it in the freezer. Hannan "freaked out" when Bresnak told her what happened.

Police executed a search warrant at Hannan's home a few days later. A key to the freezer in the storage unit was in her garage.

A forensic pathologist determined that the manner of Korber's death was homicidal violence of unknown etiology. No evidence suggested that he died a natural death. Pressure to the jugular vein or carotid artery can cause a person to lose consciousness within seconds. It is unusual, but not impossible, for a person to die from a chokehold lasting just 10 or 15 seconds. Death from a chokehold could occur without visible injury.

Prosecutors charged Bresnak with Korber's murder. A grand jury indicted Hannan for being an accessory to murder and for conspiracy to conceal a body.

Bresnak's jailhouse phone calls with Hannan

At trial, the prosecution sought to admit some of the more than 600 phone calls Bresnak made while incarcerated. The trial court denied Bresnak's motion to exclude his calls with Hannan as irrelevant, inadmissible, and unduly prejudicial.

A few days after his April 2011 arrest, Hannan told Bresnak that a plane had crashed into a Camarillo storage facility. Bresnak laughed, "God, wouldn't it be our luck." Hannan replied, "[M]y heart stopped. You know, 'cause I just

knew—I just knew." Bresnak later asked Hannan to visit him in jail, saying that he had "some ideas": "[N]ow that you know I've got a little more clarity."

In May, Bresnak told Hannan to call Thomas Gibson. "You want him to know this about you?" Hannan asked. "Yeah. I don't care," Bresnak replied. "As a matter of fact I want you to tell him that it was me." Hannan said she was going to "tell him it was an accident." Bresnak replied, "The accident was my fault . . . . I got carried away, you know."

Three days later, Bresnak asked Hannan to call Gibson again and tell him to "hold onto [his] shit" for the next four months.

In a June phone call, Bresnak and Hannan discussed engaging Gibson's assistance again. Bresnak reiterated that he "got a little carried away." Hannan replied, "Well, I'm gonna say it was an accident." Bresnak said, "That's fine. [Gibson's] not even gonna ask, okay. He's not gonna—he don't—he doesn't give a shit." When they talked the next day, Hannan alluded to Bresnak's relationship with a 23-year-old before commenting that she was with "a stiff."

Bresnak encouraged Hannan twice over the next week to call Gibson to get this "loose end tied up." Hannan said she was "not hauling any baggage with [her] anywhere." But she acknowledged that she was "probably gonna have to be in the middle of it" after she received a letter from Korber's brother. "[F]or me to just sit here and do nothing is, is not gonna look right." Korber's car had been ticketed at LAX, yet he was "supposed to be in Florida."

The following week, Bresnak again told Hannan to call Gibson. "Tell him if he has any love, you know, uh, for me at

all, you know, he'll drop everything and handle this." Frustrated that Hannan had been unable to reach Gibson, Bresnak gave her directions to his house. He told her to take Carrillo with her.

A few days later, Hannan told Bresnak that she had spoken with Gibson. She said Carrillo had not paid for the storage unit and they were "ready to take [Bresnak's] stuff," but Gibson promised to "take care of it . . . right away." Bresnak said, "[T]his ain't Gibson's first rodeo. . . . Let's just leave it at that. . . . He's got experience in the field of—you know." Hannan said that Gibson "knew" because Cunningham had called him.

In July, Bresnak expressed frustration that Gibson had not yet helped them. Hannan accused Bresnak of leaving her "without any help whatsoever." "The only one in this whole goddamn bunch that can hold their water is me. The only one that's never told a soul."

The next day, Hannan asked Bresnak, "Jesus, what the fuck possessed you to say something to her?[3] That's what I'm worried about. I mean, nobody holds their water any better than you do, and yet you said something to her. What the fuck were you thinking?" Bresnak replied, "[S]he's on the team. . . . And she'll stay on the team until I get out." He also said that Gibson would be "getting the job done" and that everyone would be "satisfied with the, uh, you know, with the work, with the handy work."

A few days later, Bresnak and Hannan made plans to remove items from Extra Space Storage and consolidate them into a new storage unit. He also instructed her on how to wire the new unit with electricity running from a light socket.

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[3] It is unclear whether Hannan was referencing Carrillo or Cunningham.

After he was arrested again in April 2013, Bresnak called Hannan. He told her to pay for the storage units and change the locks. He said, "Maybe we should. We should make a deposit in the back yard first, though." "That's what we shouldn't do," Hannan replied.

Bresnak called Hannan after his June 2013 arrest. Bresnak complained that he would "never get outta" jail again. Hannan agreed. She said that she thought police had a confidential informant because they had already searched the storage unit.

Defense case

Hannan testified at trial that she and Korber fought on March 21, 2011. She was angry because he was drunk when he picked her up at the airport. After Korber grabbed her arms and pinned her against a wall when they arrived home that night, Hannan locked herself in the car and called Bresnak. She told him that Korber was drunk, had put his hands on her, and was hitting the car window with a hammer. Bresnak told her to drive away. Hannan told him to come to the house to check on her property.

The next morning, Bresnak told Hannan that Korber had left. When she returned home, Hannan saw that Korber's car was gone. She never saw it again.

Hannan did not recall renting a trailer or a storage unit in the days after Korber disappeared. She did not help Bresnak move a freezer from Extra Space Storage to Ventura Mini Warehouse. She did not know how the freezer got to Ventura Mini Warehouse.

Hannan said she learned that Korber was dead in June 2013. Bresnak never told her that he had killed Korber or

kept his body in a freezer. The storage units she rented were for Bresnak while he was remodeling her home. She supervised the consolidation of the storage units at Extra Space Storage into the unit at Ventura Mini Warehouse, but did not hook up electricity in the new unit.

Hannan testified about her jailhouse phone calls with Bresnak. She said that the two were joking about how lucky they were that their storage unit was undamaged when they talked about the plane crashing into a Camarillo facility. Gibson was going to help them dispose of a motorcycle, and Hannan needed directions to his house to deliver checks to him. The "accident" she referenced was the affair Bresnak had with Cunningham while Cunningham was with Gibson. The "stiff" she referred to was deceased actor River Phoenix, a long-running family joke.

Hannan said she was mistaken when she told police that neither she nor Bresnak had storage units. She did not lie when she said she saw Korber leave her house in March 2011; that is what Bresnak told her had happened. She did not tell police about Bresnak going to her house the night of Korber's disappearance because there was a warrant out for his arrest.

Bresnak testified that he and Korber "co-existed" when they both lived with Hannan. Korber wanted Bresnak to move out of Hannan's house. The two did not like each other and did not communicate much. There was the passing "fuck you" to each other, but no physical altercations prior to March 21, 2011.

Bresnak said Hannan called him on March 21 and said that Korber was drunk, put his hands on her, and hit her car with a hammer. He went to the house and found Korber asleep on the bed. While Bresnak was petting Hannan's dog, Korber got up, hit him in the head with an aquarium light, and punched him

several times. They fell to the ground. Korber kept swinging at Bresnak. Bresnak put him in a headlock, but Korber kept swinging. After about 10 or 15 seconds, Korber went limp. Bresnak assumed Korber passed out and released his hold.

Believing Korber would regain consciousness in a few minutes, Bresnak went downstairs, drank a beer, and snorted some methamphetamine. After 15 or 20 minutes, he went back upstairs to tell Korber to leave. Korber was dead. Rather than call 911, Bresnak took Korber's body to the garage and wrapped it in plastic. He then put Korber's body in his truck, which he moved to an outdoor parking lot.

Bresnak went back inside and gathered Korber's belongings. He wanted to make it look like Korber had left. He put the items in Korber's car, and moved it two blocks away. He called Hannan and told her there had been a "little bit of a problem" at the house, but that everything was all right.

Bresnak did not tell Hannan what happened. He bought a freezer a few days later. He took it to Hannan's garage and put Korber's body inside. He rented a trailer, and transferred the freezer from the garage to his storage unit.

A week later, Bresnak drove Korber's car to LAX and parked it. On his way back, he told Cunningham that he had killed Korber and put his body in the freezer in his storage unit. He suggested disposing of the body to Cunningham's property.

Bresnak moved the freezer to a friend's storage unit a few days later. It remained there until his release from jail in July 2012.

Bresnak said he needed Gibson's help to move furniture out of his apartment. He also wanted Gibson to move a motorcycle for him.

Bresnak recanted his prior statements that Hannan knew Korber's body was in the freezer and that he tried to get Gibson to help her dispose of it. He said he lied when he said Hannan took care of the body while he was in custody. He also lied when he said he and Hannan discussed burying the body.

Bresnak said that he thought Korber would pass out from his chokehold. He expected him to regain consciousness once it was released. He did not expect Korber to die.

Dr. Katherine Raven, a forensic psychologist, testified that the cause and manner of Korber's death were undetermined. She could not rule out suffocation. A chokehold usually had to be maintained for three to six minutes to kill a person, though death in 10 to 15 seconds was possible.

Closing argument

During closing argument, the prosecutor told jurors that they could not "convict [Bresnak] of either voluntary or involuntary manslaughter unless [they] all unanimously agree[d] to acquit him of second degree murder." She then suggested they consider the second degree murder charge first, and argued that because the evidence proved that charge beyond a reasonable doubt they would not "even [need to] consider voluntary and involuntary manslaughter, which are instructions that are given as a matter of law." She repeated several times over the course of her argument that the instructions on manslaughter were "given as a matter of law" and that jurors would "have to find [Bresnak] not guilty of murder to even convict him of . . . manslaughter[]."

Sentencing

The probation report recommended that the trial court order Bresnak to pay victim restitution and various fines, fees, and assessments. Bresnak objected that, because it would

"take more than the rest of his life to pay" the recommended restitution and restitution fine, he did not have the ability to pay a $2,040 presentence investigation fee or a $515 booking fee. The court agreed, and declined to impose either fee. It did, however, order him to pay a $10,000 restitution fine (§ 1202.4, subd. (b)).

Bresnak subsequently moved the trial court to vacate the restitution fine because the prosecution did not show that he had the ability to pay. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).) The court denied Bresnak's motion because he did not request an ability-to-pay hearing despite his right to do so. (See § 1202.4, subd. (d).) Alternatively, the court found that Bresnak did not show that he had an inability to pay.

DISCUSSION

Bresnak's jailhouse phone conversations

Bresnak contends the trial court erroneously admitted evidence of his jailhouse phone conversations with Hannan because they were irrelevant, inadmissible, and unduly prejudicial. We disagree.

1. Standard of review

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) This standard applies to the court's rulings on relevance (*People v. Merriman* (2014) 60 Cal.4th 1, 74 (*Merriman*)), admissibility pursuant to a hearsay exception (*People v. Thompson* (2016) 1 Cal.5th 1043, 1108 (*Thompson*)), and whether evidence is unduly prejudicial (*People v. Linton* (2013) 56 Cal.4th 1146, 1181). We will not disturb those rulings unless the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Rodriguez*, at pp. 9-10.)

2. Relevance

"Only relevant evidence is admissible at trial." (*Merriman*, *supra*, 60 Cal.4th at p. 74; see Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test is whether the evidence "'logically, naturally, and by reasonable inference' [tends] to establish material facts." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, abrogated on another ground as stated in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Bresnak claims his jailhouse phone conversations with Hannan were not relevant because the only disputed issue at trial was his state of mind: whether he acted with malice when he killed Korber. But that is precisely why the conversations *were* relevant.

In none of his conversations with Hannan did Bresnak express remorse for killing Korber. And in several of the conversations Bresnak and Hannan discussed how to keep Korber's body hidden or how to dispose of it. Evidence that tends to show a lack of remorse—something generally unassociated with an accidental killing—is relevant to a defendant's intent to kill. (*People v. Anderson* (1990) 52 Cal.3d 453, 471; see also *People v. Bell* (2007) 40 Cal.4th 582, 606 ["one might reasonably expect defendant, upon recovering from the psychotic episode and realizing the senseless violence he had done, to feel tremendous remorse"], disapproved on another ground by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) So is evidence of a defendant's efforts to prevent discovery of a crime or dispose of a body. (Evid. Code, § 413; see, e.g., *People v. Famalaro* (2011) 52 Cal.4th 1, 36; *People v. Wong* (1973) 35 Cal.App.3d 812, 831

(*Wong*).) The trial court did not abuse its discretion when it determined that Bresnak's jailhouse phone conversations with Hannan were relevant.

3. Admissibility

The hearsay statements of coconspirators may be admissible against a defendant at trial if the prosecution presents independent evidence to show the existence of a conspiracy. (*Thompson*, *supra*, 1 Cal.5th at p. 1108.) Once the prosecution has made this showing, a coconspirator's statements are admissible if: (1) the declarant was participating in the conspiracy at the time they made the statement, (2) the statement was in furtherance of the conspiracy, and (3) at the time the statement was made, the defendant either was participating in the conspiracy or would later do so. (*Ibid.*; see Evid. Code, § 1223.)

The prosecution satisfied these requirements. Bresnak and Hannan rented storage units. They also rented trailers to rearrange their units. Bresnak took Cunningham to the unit where he had Korber's body stored in a freezer. The freezer was connected to electricity through a light socket, exactly as Bresnak had instructed Hannan. The freezer was also locked. Bresnak and Hannan each had keys to the lock. This evidence was more than sufficient to show the existence of a conspiracy to hide Korber's body. (*People v. Hardy* (1992) 2 Cal.4th 86, 139 [prima facie evidence sufficient].)

The prosecution also put forth evidence that Hannan was participating in a conspiracy to hide or dispose of Korber's body. Many of her conversations with Bresnak were about exactly that. Bresnak was also participating in the conspiracy. Evidence Code section 1223's requirements were satisfied.

Bresnak counters that the coconspirator hearsay exception is inapplicable here because Hannan's statements were made in furtherance of an *uncharged* conspiracy to avoid detection or arrest. In his view, *Krulewitch v. United States* (1949) 336 U.S. 440, 443-444, requires the hearsay statements to be made in furtherance of a *charged* conspiracy for the exception to apply. (See also *People v. Leach* (1975) 15 Cal.3d 419, 431 [California follows *Krulewitch* rule].) Bresnak misunderstands the *Krulewitch* rule.

As our Supreme Court has explained, *Krulewitch* "held only that 'after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.'" (*People v. Smith* (1966) 63 Cal.2d 779, 794, italics omitted.) Here, Hannan's statements were not part of a "subsidiary conspiracy to conceal" any conspiracy to murder Korber. They were made as part of a conspiracy *begun after his death* to keep the body hidden. (Cf. § 32 [defining accessory to a felony].) That that conspiracy was not charged is irrelevant for purposes of the hearsay exception. (*People v. Ambrose* (1986) 183 Cal.App.3d 136, 139 ["It is well established that the defendant need not be charged with conspiracy to apply the coconspirator exception to the hearsay rule"]; see also *People v. Brown* (2017) 14 Cal.App.5th 320, 335 [statements of uncharged coconspirators admissible pursuant to Evidence Code section 1223].)

4. Undue prejudice

The trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its

admission will . . . necessitate undue consumption of time or . . . create substantial danger of undue prejudice." (Evid. Code, § 352.) Evidence is unduly prejudicial if it has little effect on the issues and tends to evoke an emotional bias against the defendant. (*People v. Doolin* (2009) 45 Cal.4th 390, 439 (*Doolin*).) Such evidence tends to "'inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point [on] which it is relevant, but to reward or punish one side because of the jurors' emotional reaction[s].'" (*Ibid.*)

The trial court properly exercised its discretion here. As set forth above, the jailhouse phone conversations with Hannan tended to show Bresnak's lack of remorse and efforts to suppress evidence of Korber's death. This evidence was highly probative of his consciousness of guilt (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140-1141; *Wong*, *supra*, 35 Cal.App.3d at p. 831) and intent to kill (*People v. Hills* (1947) 30 Cal.2d 694, 701). Its admission did not unduly consume time: It took part of one afternoon and a portion of the following day for the jury to listen to all of the phone calls admitted into evidence—including several Bresnak does not challenge—out of 12 days of testimony. And the evidence was no more inflammatory than other evidence introduced at trial, including the pictures of Korber's body and Bresnak's statements that he wrapped the body in plastic, carried it in his truck, and kept it in a freezer for two years.

Mistake-of-fact instruction

Bresnak next contends the trial court should have sua sponte instructed the jury on his mistake-of-fact defense. There was no error.

The trial court has a sua sponte duty to instruct the jury on defenses and their relationships to the elements of the

charged offense(s). (*People v. Sedeno* (1974) 10 Cal.3d 703, 715-716, overruled on other grounds by *People v. Breverman* (1998) 19 Cal.4th 142, 149.) That duty arises if the defendant relies on a particular defense, or if substantial evidence supports a defense that is not inconsistent with the defendant's theory of the case. (*Id*. at p. 716.) But even if substantial evidence supports a defense, the court has no sua sponte duty to instruct if: (1) the defense "serves only to negate the mental state element of the charged crime," and (2) "the jury is properly instructed on the mental state element" of that crime. (*People v. Lawson* (2013) 215 Cal.App.4th 108, 117 (*Lawson*); see *People v. Anderson* (2011) 51 Cal.4th 989, 969-999 (*Anderson*).)

According to Bresnak, if instructed on mistake of fact, the jury "could have found that [he] honestly but mistakenly believed his actions would only subdue Korber" because "the force [he] employed was reasonable and not excessive." The mistake-of-fact instruction he contends the trial court should have given thus "would have served only to negate the mental state element" of the charged crime of murder. (*Lawson*, *supra*, 215 Cal.App.4th at p. 118; see *In re Jennings* (2004) 34 Cal.4th 254, 276 [belief that gun not loaded negates malice element of murder].) But the court instructed the jury on that mental state. (See CALCRIM No. 520 [murder with malice aforethought].) It was therefore required to instruct on mistake of fact only upon Bresnak's request. (*Lawson*, at p. 118; see *Anderson*, *supra*, 51 Cal.4th at p. 998.) Because Bresnak did not request the instruction, the court did not err when it did not provide it. (*Lawson*, at p. 118.)

Mutual combat instruction

Bresnak contends the trial court should not have instructed the jury on the doctrine of mutual combat as a limit on

self-defense (see CALCRIM No. 3471) because there was no substantial evidence to show that he and Korber had a preexisting agreement to fight (see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1044). But Bresnak requested that the court instruct the jury pursuant to CALCRIM No. 3471 in his trial brief. Such a "'"'conscious and deliberate tactical choice' to 'request' the instruction'"' prevents him from challenging its use on appeal. (*People v. Harris* (2008) 43 Cal.4th 1269, 1293.)

Voluntary intoxication instruction

Next, Bresnak contends CALCRIM No. 625 erroneously restricted the jury's consideration of evidence of his voluntary intoxication to the question of whether he harbored the intent to kill. In his view, section 29.4—on which CALCRIM No. 625 is based—additionally permitted the jury to consider evidence of his intoxication on the question of whether he believed he needed to act in self-defense. As Bresnak recognizes, however, our Supreme Court recently rejected this interpretation of section 29.4. (See *People v. Soto* (2018) 4 Cal.5th 968, 977.) Although he is entitled to raise his contention to preserve it for potential review by the Supreme Court and the federal judiciary, we are bound by *Soto*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We therefore reject the contention.

Prosecutorial misconduct

Bresnak contends the prosecutor committed misconduct when, during closing argument, she encouraged jurors not to consider voluntary and involuntary manslaughter as lesser included offenses to the charge of second degree murder. But Bresnak neither objected during the prosecutor's argument nor requested curative admonitions. Nor does he show that objections and requests for admonitions would have been futile.

He has forfeited this contention. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 178-179.)

Even if we were to consider Bresnak's contention, it would fail on the merits. Where, as here, a misconduct claim is "based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument." (*People v. Woods* (2006) 146 Cal.App.4th 106, 111.) "No misconduct exists if a juror would have taken the statement to state or imply nothing harmful." (*Ibid.*)

The prosecutor did not commit misconduct here. Her statements that the jury had to find Bresnak not guilty of second degree murder if it were to convict him of manslaughter were legally correct. (*People v. Fields* (1996) 13 Cal.4th 289, 309-310.) The trial court told jurors as much, without objection by Bresnak. (See CALCRIM No. 642 [court can accept verdict on manslaughter "only if all [jurors] . . . found [Bresnak] not guilty of second degree murder"].)

And her statements that the manslaughter instructions had to be given "as a matter of law" did not minimize and oversimplify jurors' duty. A trial court has a sua sponte duty to instruct on manslaughter if there is substantial evidence that the defendant committed that offense rather than murder. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162.) The prosecutor thus correctly explained to jurors the court's legal duty.

Moreover, because manslaughter was not charged, a reasonable juror would likely have understood the prosecutor's comments as explaining why the court provided instructions on that crime. This is especially likely when considering the comments alongside Bresnak's closing argument, which discussed

the manslaughter instructions at length. In context of the entire argument, a reasonable juror would not have understood the prosecutor's comments to minimize their duty.

Cumulative error

Bresnak contends the errors at trial, considered cumulatively, deprived him of due process. But we rejected all of Bresnak's claims of error. He thus cannot show cumulative prejudice. (*People v. Jablonski* (2006) 37 Cal.4th 774, 810.)

Restitution fine

Finally, Bresnak contends the trial court erred when it ordered him to pay a $10,000 restitution fine. Specifically, he contends the court's imposition of the fine without determining that he had the ability to pay violated his due process rights (see *Dueñas*, *supra*, 30 Cal.App.5th at p. 1164) and the Excessive Fines Clause of the Eighth Amendment (see *Timbs v. Indiana* (2019) __ U.S. __ [139 S.Ct. 682].) The Attorney General argues Bresnak forfeited his contentions because he did not object to the fine at sentencing. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*).) We agree that the contention is forfeited.

Whenever the trial court imposes a restitution fine above the $300 statutory minimum, it may consider the defendant's ability to pay. (§ 1202.4, subd. (c).) Here, the trial court set Bresnak's fines at $10,000—the statutory maximum. That provided Bresnak with the opportunity to bring to the court's attention any factors relevant to his ability to pay. (*Avila*, *supra*, 46 Cal.4th at p. 729; see § 1202.4, subd. (d).) He did not do so. He thus forfeited his constitutional challenges to the restitution fine. (*Avila*, at p. 729.)

Alternatively, Bresnak contends counsel provided ineffective assistance because he did not argue that Bresnak

lacked the ability to pay the restitution fine. To demonstrate that counsel provided ineffective assistance, Bresnak must show that counsel's representation was deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Counsel's representation was deficient if "there could be no rational tactical purpose for [their] omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) Bresnak was prejudiced if there is a reasonable probability he would have received a more favorable result had counsel provided adequate representation. (*Strickland*, at p. 694.)

On this record, Bresnak has not shown that counsel represented him deficiently. The record reveals that counsel may have had a tactical reason for declining to argue that Bresnak lacked the ability to pay the restitution fine: because he *did* have that ability. At sentencing, counsel stated that Bresnak did not have the ability to pay the presentence investigation fee and booking fee because it would take him "the rest of his life to pay" the restitution fine. That implied that Bresnak could, in fact, pay the fine.

Bresnak's future earning capacity bears this out. A prisoner can earn up to $56 per month performing labor in prison. (Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1).) The trial court may consider these wages, in their entirety, when it determines a defendant's ability to pay. (*People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.) Using the pay rate of $56 per month, Bresnak could earn $10,000 in just under 15 years. Trial counsel may have recognized as much, and thus did not object to the fine.

Bresnak also fails to show prejudice. Ability to pay is only one factor a trial court may consider when it sets a

defendant's restitution fine. (§ 1202.4, subd. (d).) The court can impose the maximum $10,000 fine based solely on the gravity of the offense. (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 505 (*DeFrance*).)

Bresnak killed a man and kept his dead body hidden in a freezer for more than two years. The trial court would have been justified to impose the maximum restitution fine based on the heinous nature of Bresnak's crime alone. (*DeFrance*, *supra*, 167 Cal.App.4th at p. 505.) Bresnak has not shown a reasonable possibility the court would not have done so. He thus cannot establish prejudice. His ineffective assistance of counsel claim fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gilbert A. Romero, Judge

Superior Court County of Ventura

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.